No. 18-1181

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

AHMAD FAWZI ISSA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

A jury convicted Ahmad Issa of aggravated murder. The evidence against him included out-of-court statements that Issa's accomplice, Andre Miles, made voluntarily to two friends (Joshua and Bonnie Willis). Issa claimed the admission of these statements violated the Confrontation Clause. The statements' admission does not violate the Clause as understood today; under *Crawford v. Washington*, 541 U.S. 36 (2004), the statements were nontestimonial and could therefore be admitted without violating the Confrontation Clause. The Sixth Circuit awarded Issa relief anyway, because it concluded that admitting Miles's statements violated the Clause as it was understood at the time of Issa's trial—by cases *Crawford* overruled.

The Sixth Circuit erred. Habeas petitioners are not entitled to habeas relief if their state-court proceedings were free of constitutional error under the Constitution as it is now understood. The Sixth Circuit's contrary holding created or deepened two circuit splits. This Court should grant certiorari to resolve them.

In the alternative, the Court should summarily reverse the Sixth Circuit for holding that the state court's decision was contrary to pre-*Crawford* Confrontation Clause precedents. As Judge Sutton explained below, "no constitutional violation occurred at the time of [Issa's] trial two decades ago—at least not one that AEDPA permits" the federal courts "to correct." Pet.App.357a (Sutton, J., concurring in denial of rehearing en banc).

ARGUMENT

I. Habeas petitioners are not entitled to relief if their state-court proceedings were free of constitutional error.

A. This Court should grant review on the first question presented to resolve two circuit splits.

AEDPA requires every habeas petitioner challenging a state conviction to make two showings relevant here. *First*, he must show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). This inquiry is backwards looking; it asks whether the state court misapplied Supreme Court precedent applicable at the time of the state-court proceeding. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). *Second*, a petitioner must show "that he is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). The question here is whether this second requirement is forwards or backwards looking. More specifically, it concerns whether a petitioner "is in custody in violation of the Constitution," § 2254(a), if the state court's decision is free of constitutional error under the Constitution *as understood today*.

The answer is "no," as the Third and Eleventh Circuits have held. *Mitchell v. Superintendent Dallas SCI*, 902 F.3d 156, 163–64 (3d Cir. 2018), cert. denied sub nom *Mitchell v. Mahally*, 139 S. Ct. 1292 (2019); *Holland v. Florida*, 775 F.3d 1294, 1313–14 (11th Cir. 2014). This follows from the statute's text, which speaks in the present tense of a prisoner who

"*is* in custody in violation of the Constitution." It follows from context, too. Congress passed AEDPA to make it *harder* to seek habeas relief. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000). Given that context, it would be stunning if AEDPA permitted courts to award relief to prisoners whose convictions and sentences are valid under binding precedent.

Notwithstanding all this, habeas petitioners in the Sixth Circuit (and arguably the Fifth) may obtain relief based on a state court's misapplication of overruled Supreme Court decisions—even if the state court's decision is constitutional under now-binding precedent. *See* Pet.App.10a–11a & n.2; *Fratta v. Quarterman*, 536 F.3d 485, 501–07 & n.15 (5th Cir. 2008). Applying that rule here, the Sixth Circuit held that it could award Issa habeas relief *without regard* to the fact that the state court did not violate the Confrontation Clause as it is understood today. Pet.App.10a–11a & n.2.

This split alone warrants this Court's attention. The need for review is all the more important because the Sixth Circuit created a second split in justifying its creation (or deepening) of the first.

The Sixth Circuit justified its rule by noting that *Crawford* is non-retroactive under this Court's decision in *Whorton v. Bockting*, 549 U.S. 406, 421 (2007). Pet.App.11a. *Whorton* held that *Crawford* was non-retroactive under the so-called "*Teague* bar," which generally prohibits prisoners from collaterally challenging their convictions based on new constitutional rules announced in decisions issued after their convictions became final. *Whorton*, 549 U.S. at 416, 421.

The second split arises because, until the decision below, the circuits agreed that the *Teague* bar applies only to habeas petitioners, and that it does not prohibit the States from using later-issued decisions to *defend against* collateral attacks. *See Delgadillo v. Woodford*, 527 F.3d 919, 927–28 (9th Cir. 2008); *Flamer v. Delaware*, 68 F.3d 710, 725 n.14 (3d Cir. 1995) (Alito, J.); *Free v. Peters*, 12 F.3d 700, 703 (7th Cir. 1993). The rule in those circuits makes sense. The *Teague* bar exists to stop States from being "penalized for relying on the constitutional standards that prevailed at the time the original proceedings took place." *Delgadillo*, 527 F.3d at 927 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)) (internal quotation marks omitted). The *Teague* bar is therefore irrelevant in cases where the States invoke a new constitutional rule to *defend against* a collateral attack.

The Sixth Circuit contradicted these cases by invoking the *Teague* bar as a limitation on the States. It thus created a second split deserving of this Court's attention.

B. Issa's arguments in opposition fail.

Issa asks this Court to deny review of the circuit splits just discussed, but he gives no good reason for doing so.

1. Circuit split regarding § 2254(a). Issa recognizes that the circuits disagree whether habeas petitioners can win relief even if their state-court proceedings were free of constitutional error under now-binding Supreme Court doctrine. BIO.9–10. But he gives four reasons for concluding that the split is insignificant. Each is legally irrelevant, and factually or legally incorrect.

First, he says that there is no split concerning whether petitioners alleging a violation of pre-*Crawford* law can prevail without also showing a violation of post-*Crawford* law. According to Issa, only the Fifth and Sixth Circuits have addressed that narrow issue, and both agree that petitioners need not make this showing. BIO.9.

This argument is factually misguided. In *Mitchell*, the Third Circuit held petitioners alleging a violation of pre-*Crawford* precedent must also show a violation of the Confrontation Clause as it is understood today. 902 F.3d at 163–64. Issa says the case is not "squarely on point," BIO.9, but he identifies no relevant distinction.

The argument is irrelevant anyway. As Issa appears to concede, the circuits are unambiguously divided on the broader question whether federal courts may award habeas relief to petitioners whose state-court proceedings were free of constitutional error under now-binding case law. It makes no difference whether they have addressed the question in the specific context of the Confrontation Clause; there is no reason to think AEDPA applies differently to the right of confrontation than to other rights. What is more, the broader question is far more important than the narrow question specific to the Confrontation Clause. After all, the broader split is implicated every time a habeas petitioner seeks relief based on the state courts' alleged misapplication of any now-overruled case.

The breadth of the split—the fact that it is not limited to the Confrontation Clause—defeats any argument that the decreasing numbers of habeas-eligible prisoners convicted pre-*Crawford* diminishes

the split's importance. BIO.9–10; *see also* Pet.App.366a (Sutton, J., concurring in denial of en banc review). This Court more-than-occasionally overrules, alters, or clarifies criminal-law precedents—sometimes in a way that could favor the States in some subset of cases. *See e.g.*, *Ohio v. Clark*, 135 S. Ct. 2173, 2180–81 (2015); *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009); *Indiana v. Edwards*, 554 U.S. 164 (2008). Section 2254(a)'s meaning comes into play every time a habeas petitioner's claim fails under the revised or clarified doctrine. Thus, the diminishing number of pre-*Crawford* convictions does not diminish the circuit split's importance.

Second, Issa tries to diminish the split's significance by characterizing the Eleventh Circuit's holding in *Holland* as "speculative dicta." BIO.10. This argument is irrelevant because the circuits would be split even if the Eleventh Circuit had never weighed in. The argument is incorrect because *Holland*'s thorough analysis is not "speculative dicta." The petitioner in that case sought relief under § 2254(d)(1), arguing that the state courts denied him the right to represent himself in contravention of *Faretta v. California*, 422 U.S. 806 (1974). *Holland* rejected that argument. 775 F.3d at 1312. But it also explained that § 2254(a) provided an "alternative basis" for denying relief: Section 2254(a) permits awarding relief only to petitioners whose claims have "not been rendered nugatory by subsequent Supreme Court precedent," and Holland's claim failed under *Indiana v. Edwards*, 554 U.S. 164, which this Court issued after Holland's trial. *Holland*, 775 F.3d at 1313. This "alternative basis" for denying relief was nei-

ther "speculative" nor "dicta"; it was a thoroughly reasoned alternative holding.

Third, Issa argues that the split is not presented in this case because the evidence against him "may" be inadmissible even under *Crawford*. BIO.14. The argument is irrelevant; the possibility that Issa "may" win on remand for a different reason does not diminish the suitability of this case as a vehicle for reviewing the circuit split. Regardless, he will not win on remand. The Confrontation Clause prohibits introducing out-of-court statements *only if* they are "testimonial." To qualify as testimonial, statements must be "made with the primary purpose of creating evidence." *Clark*, 135 S. Ct. at 2181. Under this test, Miles's out-of-court statements to his friends "were not remotely testimonial"; he did not make those statements "solemnly or in order to establish a fact for trial." Pet.App.363a (Sutton, J., concurring in denial of en banc review).

Finally, Issa argues that the Sixth Circuit properly interpreted § 2254(a). He says that habeas petitioners may be entitled to relief *even if* they are not being held in violation of the Constitution as it is now understood. BIO.10–11. The argument is irrelevant because the Court should resolve the circuit split even if the Sixth Circuit is on the right side of it.

The argument is wrong as well. Issa's defense of the Sixth Circuit does not even mention § 2254(a)'s text or AEDPA's purpose. He does point to cases holding that § 2254(*d*)(*1*) is backwards looking. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63 (2002); *Cullen*, 563 U.S. 170. But decisions relating to a § 2254(d)(1) have no bearing on § 2254(a)—they are different sub-

sections with different text that impose different requirements. Issa also defends the Sixth Circuit's decision on consequentialist grounds, arguing that the Warden's reading of § 2254(a) "invites" prosecutors "to manipulate the trial process to get a conviction using unconstitutional methods in the hope that the law will change." BIO.12. That is not a serious concern. No rational prosecutor would purposely violate Supreme Court precedent in hopes that—*if* the conviction somehow survives direct appeal and state post-conviction proceedings—this Court will overrule its precedent in time to defeat the defendant's federal habeas petition.

***2. Circuit split regarding* Teague.** Issa denies that the Sixth Circuit created a circuit split regarding *Teague*'s application. He agrees that the Court invoked the *Teague* bar to support its application of § 2254. He also agrees that the Third, Seventh, and Ninth Circuits have held that *Teague* imposes no bar at all on the government. *Free*, 12 F.3d at 703; *Delgadillo*, 527 F.3d at 927–28; *Flamer*, 68 F.3d at 725 n.14. But Issa says that those decisions are distinguishable, because none expressly held that the earlier state-court proceedings at issue misapplied then-binding precedent. It is therefore possible, Issa says, that these courts would prohibit States from using new constitutional rules to defend against collateral attacks on cases that were wrong at the time of decision. BIO.18.

Nothing in the Third, Seventh, or Ninth Circuits' decisions suggests they left this issue open. Each held that *Teague* is irrelevant in cases where the State, rather than a habeas petitioner, seeks to apply a rule retroactively. Moreover, it would be absurd to allow States to invoke new constitutional rules only

in defense of decisions that comply with *old* constitutional rules—in all such cases, the State would win without needing to rely on the new rule. The Third, Seventh, and Ninth Circuits did not adopt so pointless a holding.

3. Waiver. Issa claims that the first question presented is not before the Court. He first accuses the Warden of conceding below that *Ohio v. Roberts*, not *Crawford*, "set forth the applicable standard." BIO. 6. The quoted language refers to the standard under § 2254(d)(1) only; the Warden never conceded that Issa could win relief without also showing, as § 2254(a) requires, a violation of the Confrontation Clause as understood today.

Regardless, this Court may properly consider any issue passed on by the lower court, whether or not the parties raised it themselves. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* 465–66 (10th ed. 2013) (citing cases). Here, the Sixth Circuit held that Issa *did not* have to show that his conviction violated the Constitution as it is now understood. In the process, it rejected earlier Sixth Circuit decisions holding that § 2254(a) required just the opposite. Pet.App.10a–11a n.2. And it expressly probed the issue with both parties at oral argument. *See* Pet.10, 22–23. So the Court may consider the question.

II. The Sixth Circuit egregiously misapplied AEDPA again.

If the Court denies certiorari as to the first question presented, it should summarily reverse on the second: the Sixth Circuit misapplied § 2254(d)(1) when it held that the Ohio Supreme Court's decision was "contrary to" pre-*Crawford* law.

A. Section 2254(d)(1) permits federal courts to award habeas relief *only if* the state-court decision under review "was contrary to, or involved an unreasonable application of, clearly established Federal law." A state decision is "contrary to" clearly established federal law if it: (1) "applies a rule that contradicts the governing law set forth" in Supreme Court precedent; or (2) confronts "a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at" a different result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

The Sixth Circuit held that the Ohio Supreme Court's decision affirming Issa's conviction "was contrary to" *Idaho v. Wright*, 497 U.S. 805 (1990). *See* Pet.App.18a. Under the *Ohio v. Roberts* framework, the Confrontation Clause allowed the admission of out-of-court statements bearing sufficient "indicia of reliability." *Roberts,* 448 U.S. at 66. *Wright* held that courts should assess a statement's reliability with regard to "the totality of the circumstances." *Wright*, 497 U.S. at 819. The Sixth Circuit held that the Ohio Supreme Court contradicted *Wright* by deeming Miles's statements "trustworthy simply because he made them to his friends," Pet.App.18a.

Judge Sutton, with considerable understatement, explained that "[o]nly a most ungenerous reading of the Ohio Supreme Court's decisions permits the conclusion that the court failed to considered all of the material circumstances surrounding the statements or applied the [*Wright*] test unreasonably." Pet.App.362a (Sutton, J., concurring denial of rehearing en banc). Indeed, the very passage of the Ohio Supreme Court's opinion that the Sixth Circuit panel quoted in full, Pet.App.17a, identifies "ten fac-

tors" indicating reliability, Pet.App.360a (Sutton, J., concurring in denial of rehearing en banc).

The panel, however, concluded that the state court failed to account for two relevant circumstances. *First*, Miles's statements to the Willeses partly contradicted testimony he gave years later in the trial of Linda Khriss—the woman who allegedly came up with the murder-for-hire scheme that Issa and Miles carried out. Pet.App.22a. *Second*, while the Ohio Supreme Court did consider the fact that Miles was boasting, it concluded that his boasting made the statements more reliable rather than less reliable. Pet.App.20a, 22a.

Neither consideration justified the Sixth Circuit's decision. The Ohio Supreme Court would have committed legal error if it considered Miles's testimony in the Khriss trial. *See* Pet. 29–30; Pet.App. 361a (Sutton, J., concurring in denial of en banc review). And reasonable minds can disagree whether a boastful admission that implicates a third person is more or less reliable than a statement that simply shifts blame to that person. *See* Pet.29; Pet.App. 361a-362a (Sutton, J., concurring in denial of en banc review). Most fundamentally, § 2254(d)(1) permits federal courts to award habeas relief only if the state court's misapplication of Supreme Court precedent is so clear as to be beyond "any possibility for fairminded disagreement." *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (internal quotation marks omitted). Here, there is no Supreme Court precedent that the Ohio Supreme Court can be said to have so obviously contradicted with its consideration (or non-consideration) of the two circumstances that the Sixth Circuit identified. As such, its decision was not

"contrary to … clearly established federal law." § 2254(d)(1).

B. Issa asserts that the Ohio Supreme Court "considered only the fact that Miles purportedly made his statements to friends rather than police and its assumption that Miles had no reason to lie." BIO.19. But immediately after this assertion, Issa quotes the part of the state court's decision laying out ten factors indicating reliability. BIO.19–20.

Perhaps recognizing the inconsistency between his position and the quoted language, Issa quickly changes tack, arguing that the "other factors mentioned by the Ohio Supreme Court are refuted by the record." BIO.20. Even if that were true it would be irrelevant; the Sixth Circuit awarded relief based on the supposed misapplication of settled law, not based on a misinterpretation of the record. Regardless, it is not true. All of the supposed "refutations" are really just disagreements about the significance or descriptions of an agreed-upon fact. *See* BIO.20–21.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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